82-1613

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

HELMERICH & PAYNE, INC.
Petitioner

v.

ROCK ISLAND IMPROVEMENT COMPANY
Respondent

v.

SAM SEXTON, JR.
Third Party Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES R. EAGLETON
MARC F. CONLEY
HOUSTON AND KLEIN, INC.
3200 University Tower
1722 South Carson
P.O. Box 2967
Tulsa, Oklahoma 74101
(918) 583-2131

Attorneys for Petitioner,
Helmerich & Payne, Inc.

April, 1983

QUESTIONS PRESENTED

1. Whether the owner of real property leased for surface coal mining can recover in damages for breach of a reclamation provision of the coal mining lease $375,000.00, when counsel for the landowner stipulated at trial that full and complete reclamation of the land would increase its fair market value a total of $6,797.00, and that the surface of the land fully reclaimed would have a total fair market value of $76,345.00.

2. Whether the question of whether or not the rule of damages as set out in *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okl. 1962), is still the law of Oklahoma should be certified to the Oklahoma Supreme Court.

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the United States Court of Appeals for the Tenth Circuit are listed in the caption hereto. The parent corporation of Respondent, Rock Island Improvement Company, is Rock Island Railroad Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit entered January 21, 1983, is reported as *Rock Island Improvement Co.* v. *Helmerich & Payne, Inc.*, v. *Sam Sexton, Jr.*, ... F.2d ....., No. 81-1080 (10th Cir. 1983), and is set out as Appendix A hereto. The Order of the Court of Appeals for the Tenth Circuit denying Helmerich & Payne's Petition for Rehearing, Suggestion for Hearing En Banc, and Motion to Certify Question to the Oklahoma Supreme Court, dated February 23, 1983, is set out as Appendix B hereto.

There was no opinion in the District Court for the Eastern District of Oklahoma. The jury verdict and judgment of the District Court are set out as Appendices C and D hereto, respectively.

JURISDICTIONAL BASIS OF THIS PETITION FOR WRIT OF CERTIORARI

The Petitioner seeks, by Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, review of the final judgment of that court entered on January 21, 1983 (Appendix A, *infra*).

The Court of Appeals for the Tenth Circuit denied a Petition for Rehearing, Suggestion for Hearing En Banc, and Motion to Certify Question to the Oklahoma Supreme Court, on February 23, 1983 (Appendix B, *infra*). There has been no Order granting an extension of time within which to petition for certiorari.

Jurisdiction for this Court to review the judgment in question is believed to be conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 23 O.S. 1981 § 96, provides:

> Notwithstanding the provisions of this chapter[1], no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in cases where recovery may be for exemplary damages and penal damages, and in Sections 2871 and 2878.[2] R.L.1910, § 2889.
>
> [1]R.L.1910, ch. 24, now incorporated in this title.
>
> [2]Sections 40, 67 of this title.

Title 23 O.S. 1981 § 97, provides:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. R.L.1910, § 2890.

Section 2871 referred to in § 96, *supra*, is codified at 23 O.S. 1981, § 40, which provides:

> The damages for the breach of a promise of marriage rest in the sound discretion of the jury. R.L. 1910, § 2871.

Section 2878 referred to in § 96, *supra*, is codified at 23 O.S. 1981 § 67, which provides:

> The damages for seduction rest in the sound discretion of the jury. R.L.1910, § 2878.

The 1971 Oklahoma Mining Lands Reclamation Act, 45 O.S. 1971 §§ 721-738, as it existed at all times pertinent hereto is set out in full as Appendix E hereto.

The decision of the Attorney General of the State of Oklahoma dated October 16, 1978, construing the 1971 Oklahoma Mining Lands Reclamation Act as applied to the land involved herein is set out as Appendix F hereto.

STATEMENT OF FACTS

April 8, 1968, Rock Island Improvement Company (hereinafter Rock Island) granted a Lease of Coal Deposits to Helmerich & Payne covering 5,205 acres for a term ending July 31, 1977, which provided for the lessee to pay yearly delay rentals of $5,204.93, together with ad valorem taxes, and providing in part in paragraph 3, page 1, in reference to reclamation:

> Upon the abandonment or completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation, including the removal of any and

all such works, buildings, plants, structures and appliances placed thereon for said mining operation.

Helmerich & Payne did not mine any coal under the subject lease.

November 20, 1974, Helmerich & Payne entered into a Sublease and Agreement with Sam Sexton, Jr., giving him the right to mine coal as operator under the Subject Lease.

In early 1977, Billy R. Weiher, Assistant State Mine Inspector, reported, in reference to a portion of the leased land known as the Heavener pit (also known as Tract 1), that there were approximately 50 acres disturbed; and in reference to a portion of the leased land known as the Petros pit (also known as Tract 2), that there were approximately 45 acres disturbed; and that the operator "has continuaily made an effort to comply with the Oklahoma Mining Laws and to fulfill all recommendations in safety and reclamation made by an inspector of the Oklahoma Department of Mines."

July 31, 1977, the subject lease expired.

May 18, 1978, Oklahoma Department of Mines forfeited and obtained in cash the $50,000.00 bonds posted by the operator for reclaiming Tracts 1 and 2.

October 16, 1978, the Attorney General of the State of Oklahoma advised the Oklahoma Department of Mines by letter opinion (Appendix F, *infra*, at p. 3f) that the sole remedy for failure to complete the reclamation on Tracts 1 and 2 under the permits issued by the Oklahoma Department of Mines was the forfeiture of the performance bonds of $50,000.00 by the operator, which had previously occurred.

November 10-12, 1980, this case was tried before a jury in the United States District Court for the Eastern District of Oklahoma, at which time the Honorable Judge Frank H. Seay ruled that the measure of damages was governed by *Peevyhouse* v. *Garland Coal & Mining Co.*, 382 P.2d 109 (Okl. 1962), as the law of Oklahoma.

During trial the chief executive officer of Rock Island, Bruce E. Clinton, testified that in his opinion there could be remaining 750,000 to 1,000,000 mineable tons of coal under Tract 1, and that in 1976 and 1977 he had run two general advertisements soliciting bids from various coal companies to mine coal under the subject tracts.

During trial the attorney for Rock Island, David L. Russell, stipulated that the testimony of Otis Eversole, as set out in Defendant's Exhibits 81 and 82, regarding the value of the subject property, was true. Exhibits 81 and 82 are set out as Appendix G hereto. This stipulation provided that on July 31, 1977, with full and complete reclamation the surface of the "Rees-Heavener" tract (Tract 1) had a fair market value of $50,567.00, and the surface of the "Rees-Petros" tract (Tract 2) had a fair market value of $25,778.00. Thus, the total surface value of the subject tracts fully restored was stipulated by Rock Island to be $76,345.00. The diminution in value so stipulated to, occasioned by the failure to reclaim, was $6,797.00.

The jury returned a verdict against Helmerich & Payne in the amount of $375,000.00 as the cost of reclamation.

BASIS OF FEDERAL JURISDICTION

This controversy was tried to the United States District Court for the Eastern District of Oklahoma as a matter arising out of diversity of citizenship jurisdiction, with an amount in controversy of greater than $10,000.00, pursuant to 28 U.S.C. § 1332.

The final judgment of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §§ 1291, 1294.

REASONS FOR GRANTING THE WRIT

The principal issue in this controversy is the measure of damages suffered by a lessor of coal deposits upon the failure of the lessee to perform fully a reclamation provision of the lease subsequent to surface mining.

The Oklahoma Supreme Court addressed this identical issue in *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okl. 1962), holding:

> Syllabus by the Court
>
> Where, in a coal mining lease, lessee agreed to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties, except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; *however, where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly dis-*

proportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the nonperformance. (Emphasis added)

. . . .

23 O.S. 1961 §§ 96 and 97 provide as follows:

"§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides * * *.

"§ 97. * * * Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered."

Although it is true that the above sections of the statute are applied most often in tort cases, they are by their own terms, and the decisions of this court, also applicable in actions for damages for breach of contract. It would seem that they are peculiarly applicable here where, under the "cost of performance" rule, plaintiffs might recover an amount about nine times the total value of their farm. Such would seem to be "unconscionable and grossly oppressive damages, contrary to substantial justice" within the meaning of the statute. Also, it can hardly be denied that if plaintiffs here are permitted to recover under the "cost of performance" rule, they will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96.

The law of Oklahoma, then, as set forth by its highest court, is clear. Upon the breach of a reclamation provision of a coal mining lease, the measure of damages is the dimi-

nution in value to the property where the cost of reclamation is grossly disproportionate to that disminished value and reclamation is incidental to the main purpose of the lease.

At the trial of this controversy, counsel for Rock Island stipulated to Helmerich & Payne's evidence that the diminution in value of the land in question by failure to reclaim was $6,797.00, and further that the total fair market surface value of the land fully reclaimed would be $76,345.00.

The Trial Court declined to interpret the unambiguous lease with respect to whether or not the reclamation provision was incidental to its main purpose. Instead, the interpretation of the lease was submitted to the jury, in the absence of any evidence regarding negotiation of the lease, and the circumstances and conditions existing when the lease was granted. Rock Island never alleged that the reclamation provision was a main purpose of the lease.

The Trial Court correctly instructed the jury that *Peevyhouse, supra,* accurately stated the law of Oklahoma. The jury returned a verdict in favor of Rock Island for $375,000.00 as the cost of reclaiming the land. The Trial Court denied timely motions for judgment notwithstanding the verdict, to amend the judgment, and for a new trial.

The Court of Appeals for the Tenth Circuit correctly found that the Trial Court erred in submitting the interpretation of the lease to the jury (Appendix A, *infra,* at p. 4a). Neither did the Court of Appeals question the stipulated fair market value nor diminution in value of the land.

Nonetheless, the Court of Appeals affirmed the jury's verdict on the grounds that *Peevyhouse, supra,* no longer states the law of Oklahoma. In so ruling, the Court of Appeals relied upon the 1971 Mining Lands Reclamation Act, 45 O.S. 1971 § 721, *et seq.* There have been some revisions in this Act since this action was commenced. The statute as originally enacted is set out at Appendix E, *infra.*

1. The History and Development of the Applicable Oklahoma Law of Damages.

A full appreciation of the Oklahoma law of damages which precludes the type of windfall recovery awarded in this action, and sanctioned by the Court of Appeals, is best imparted by chronologically setting out the pertinent Oklahoma authority. Contained within this chronology are citations of authority from other jurisdictions which have considered this matter and have followed the rule of *Peevyhouse, supra.*

August 27, 1890, the first Legislative Assembly of Oklahoma Territory set forth the law of Oklahoma with respect to damages for breach of contract as follows:

St. 1890, § 2656:

> Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in [the cases specified in the articles on exemplary damages and penal damages, and in Sections 2638, 2645 and 2646] *cases where recovery may be had for exemplary damages and penal damages, and in Sections 2871 and 2878.*

Now codified at 23 O.S. 1981 § 96, as originally enacted. The bracketed language was revised as underlined in 1910, Rev. L. 1910, § 2889.

St. 1890, § 2657:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

Now codified at 23 O.S. 1981 § 97, as originally enacted.

From 1910 to the present date, the Oklahoma Legislature has not changed 23 O.S. §§ 96, 97, *supra*.

February 4, 1958, the Oklahoma Supreme Court held in *Gallaspy* v. *Warner*, 324 P.2d 848, 852-53 (Okl. 1958):

> Plaintiff in error contends that the judgment is in excess of the damage sustained by plaintiff and greater than he could have gained by the continued operation of the well. We think the contention must be sustained. Our attention is called to 23 O.S. 1951 § 96, which provides that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except where recovery may be for exemplary and penal damages. The statute is referred to and applied in Rucker v. Mason, 61 Okl. 270, 161 P. 195; Gilmore v. Battles, 193 Okl. 396, 144 P.2d 114; and Anderson v. Hodges, 187 Okl. 43, 100 P.2d 853. Anderson v. Hodges, supra, holds:
>
> > "In an action for the breach of a lease contract, the contract itself and the law applicable thereto must furnish the measure of damages, and the amount recovered cannot except in cases where recovery may be had for exemplary damages and

> penal damages, exceed the amount the plaintiff could have gained by a full performance of the the lease contract on both sides."

February 6, 1962, the Supreme Court of Oklahoma held in *Groendyke Transport, Inc.* v. *Merchant*, 380 P.2d 682, 686-87 (Okl. 1962):

> Syllabus by the Court
>
> 3. In action for breach of contract, the contract itself and the law applicable thereto must furnish the measure of damages, and the amount recovered cannot exceed amount plaintiff could have gained by full performance of contract on both sides except in cases where recovery may be had for exemplary and penal damages.

December 11, 1962, the Supreme Court of Oklahoma in *Peevyhouse* v. *Garland Coal & Mining Company, supra*, applied the above-quoted damage statutes to the breach of a reclamation provision of a coal mining lease.

January 7, 1964, the Oklahoma Supreme Court held in *Allied Hotels, Ltd.* v. *Barden*, 389 P.2d 968, 972-73 (Okl. 1964):

> In the second paragraph of the syllabus of Ellison v. Walker, Okl., 281 P.2d 931, we held:
>
> "The measure of damages to real property which are of a temporary character is the reasonable cost of repairing the damage or restoring the property to its former condition, *where, as herein, the cost of restoration or repairing is shown to be less than the fair value of the property before and after the injury* and the building can be restored to substantially the condition it was prior to the injury." (Emphasis added)

May 27, 1968, the Court of Appeals for the Seventh Circuit approved *Peevyhouse, supra,* in *Bowes* v. *Saks & Company,* 397 F.2d 113, 116-17 (7th Cir. 1968):

> Cost of repairs is merely a convenient way to quantify the damage a lessor has suffered. Where the facts indicate that cost of repairs is unrelated to lessor's actual damage, the rule is not applied. Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (L. Hand, J.).
>
> "In an action for breach of contract, as opposed to a suit sounding in specific performance, the lessor is entitled only to the damages that were caused to the property by the failure to restore. Where the expense of restoration exceeds the diminution in the market value of the property caused by the lessee's nonperformance, the diminution in fair market value is the proper measure of damages." Dodge Street Building Corp. v. United States, 341 F.2d 641, 644, 169 Ct.Cl. 496 (1965). If the "cost of repair" rule will give lessors a greater benefit from the breach than could be gained from full performance, a different measure of damages must be applied to avoid injustice. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113 (Okla. 1963). Accord, Giordano v. Brandywine Mushroom Corp., 32 Pa.Dist & Co. R.2d 522, 525-26 (1963). And see Realty Associates v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956).
>
> The rule is analogous to the doctrine governing breach of construction contracts, most clearly stated by Judge Cardozo in Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921). "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value." 230 N.Y. at 244, 129 N.E. at 891. Accord, McCormick, Damages § 168. (Footnotes omitted)

January 17, 1972, the Court of Appeals for the Fourth Circuit held in *Associated Stations, Inc.* v. *Cedars Realty & Development Corp.*, 454 F.2d 184, 188 (4th Cir. 1972):

> In assessing damages, the district court used the "cost of restoration" standard. Damages were based on the amount it would have cost to restore the property to the condition it had been in when the property was leased to Cedars. This is the general rule for determining damages to leasehold property in Virginia. See Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 167 S.E.2d 334 (1969); Vaughan v. Mayo Milling Co., 127 Va. 148, 102 S.E. 597 (1920); Moses v. Old Dominion Iron and Nail Works Co., 75 Va. 95 (1880). In none of these cases, however, was there any contention that the cost of restoring the property to its former condition greatly exceeded any benefit to the market value of the property. Cedars has made this very assertion — that the cost of repair does exceed any benefit to the value of the property — and thus we have no controlling Virginia ruling on this point.
>
> The object of damages in a contract case is to restore the plaintiff to the position he would have been in had the contract not been breached. The "cost of restoration" method is one convenient way of determining the amount of damages to be awarded the plaintiff where a breach had occurred. There are, however, certain situations where this method of computing damages does not restore the plaintiff to the position he would have been in had the contract not been breached, but rather places him in a better position, thus providing him with a windfall. In those cases courts have resorted to alternative methods of computing damages in order to insure that, as far as possible, the plaintiff neither loses nor benefits from the breach.

May 9, 1972, the Oklahoma Supreme Court cited *Peevyhouse, supra,* with approval, although finding it did not apply, in *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236, 1239 (Okl. 1972):

> Cities contends also that Western was required to utilize the damage theory which would result in the lowest damage estimate. In support Peevyhouse v. Garland Coal and Mining Company (Okl., 382 P.2d 109, 110) is cited. The claimed applicable language is: "* * * where the contract provision which was breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of nonperformance." In *Peevyhouse*, the lessee was required, upon the expiration of the coal mining lease to perform certain remedial work which was not done. To do the remedial work would have cost $29,000 with the result that the value of the premises would only be increased $300.00. We held only $300.00 could be recovered. Peevyhouse is not applicable. The efforts of Cities to defeat Western's application to abandon service to Cities, thus freeing Western's gas for a more lucrative market is more than incidental to the main purpose of the Contract.

In 1972 the Honorable Luther B. Eubanks, Judge for the United States District Court for the Western District of Oklahoma, ruled in *Hitchcock, infra,* that *Peevyhouse, supra,* was the law of Oklahoma.

June 19, 1973, the Tenth Circuit Court of Appeals, in a decision by Circuit Judge Seth, sitting on a panel with Circuit Judge Barrett and Senior District Judge Talbot

Smith, found that *Peevyhouse, supra,* accurately states the law of Oklahoma in *Hitchcock* v. *Peter Kiewit & Sons Company, Inc.,* 479 F.2d 1257 (10th Cir. 1973):

> At no time does it appear that the jury was told even though Peevyhouse was to be followed if applicable, it was their duty to determine whether the provisions relative to sloping the land and replacing the topsoil were "main" purposes of the contract here concerned, or merely "incidental." They were only told that if they found that the provisions were incidental, they were to apply the rule as to damages set forth in Peevyhouse. Thus the jury never decided this question. The court seemingly read Peevyhouse to them as having made that determination as a matter of law. The result of the injection of the state court opinion into the case as a direct instruction to the jury resulted inadvertently in taking from the jury the determination of whether or not the restoration of the land surface was incidental to the agreement or not. This is a fact question for the jury.
>
> A careful reading of the transcript convinces us that there was at least a strong probability that the jury thought that they were foreclosed from deciding this issue because of the Oklahoma Supreme Court's decision in Peevyhouse. Further remarks regarding the Peevyhouse rule and the instructions to the jury, adequate in themselves, were not clear enough and unequivocal enough to clear up the initial misdirection.

November 23, 1976, the Oklahoma Court of Appeals held in *Conkin* v. *Ruth,* 581 P.2d 923, 925 (Okl. App. 1976):

> The measure to be applied in compensatorily assessing "temporary" damage to realty arising out of the diversion of surface water flowage is the reasonable costs of repairing the damage, restoring the land to its prediversion state, or otherwise abating the det-

riment, *if such cost is less than the fair prediversion value of the property.* Allied Hotels, Ltd. v. Barden, Okl., 389 P.2d 968 (1964). If the damage is permanent, however, then the measure to be used is the difference between the value of the property before the diversion and its value afterward. Keck v. Bruster, Okl., 368 P.2d 1003 (1962). (Emphasis added)

Damage to realty is deemed to be permanent if irreparable, irremedial, or the remedial costs exceed the value of the property. Allied Hotels, Ltd. v. Barden, supra.

April 27, 1977, the United States Court of Claims found *Peevyhouse, supra,* controlling in *Missouri Baptist Hospital* v. *U. S.*, 555 F.2d 290, 294-95 (C.C. 1977):

The Government relies on cases such as Bowes v. Saks & Co., 397 F.2d 113 (7th Cir. 1968); Dodge Street Building Corp. v. United States, 341 F.2d 641, 169 Ct. Cl. 496 (1965); Spitzel v. United States, 146 Ct.Cl. 399 (1959); Realty Associates, Inc. v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956); and Eaddy v. United States, 139 F.Supp. 49, 134 Ct.Cl. 338 (1956) to support its contention that the measure of damages for breach of a covenant to return the leased premises to the lessor in its original condition, is not the cost of repair where such cost exceeds the diminution in fair market value of the premises.

Plaintiff strenuously urges that these cases concern cost of restoration clauses and not cost of repair clauses; that costs to restore are not the same as costs to repair premises; and that a contrary rule should apply in repair cases. We disagree, and hold for defendant except with regard to its two counterclaims, which we deny pursuant to the trial judge's opinion, infra.

> The overall purpose of the aforementioned measure of damages rule, as we see it, is to avoid windfall recoveries.
>
> . . . .
>
> We hold that repair costs are subjected to a ceiling. That ceiling is the diminution in fair market value attributable to defendant's breach.

June 16, 1980, the Court of Appeals for the Sixth Circuit held in *Middendorf* v. *Fuqua Industries, Inc.*, 623 F.2d 13, 18-19 (6th Cir. 1980):

> A number of states follow the rule that where a landlord sues before the end of the term of a lease for breach of a covenant to repair, the measure of damages is the injury to the reversion rather than the cost of repairs. E.g., Tobin v. Union News Co., 18 A.D.2d 243, 239 N.Y.S.2d 22, 26 (N.Y.Sup.Ct.App.Div. 1963), aff'd, 13 N.Y.2d 1155, 247 N.Y.S.2d 385, 196 N.E. 2d 735 (1964); National Bank of Detroit v. Voight's Estate, 357 Mich. 647, 99 N.W.2d 504, 507 (1969); Corbett v. Derman Shoe Co., 338 Mass. 405, 155 N.E. 2d 423, 429 (1969); Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (applying New York Law). See also Annot. 80 A.L.R. 2d 983, 987, 989 (1961).
>
> In actions by lessors for damage to leased premises in excess of ordinary wear and tear at the time of the surrender of the property, the Ohio rule was stated in Sopronyi v. Asztalos, 101 N.E.2d 161, 162 (Ohio App. 1949), as follows:
>
> > The measure of damages is the difference between the market value of the property would have had at the time of the surrender of possession by the defendant, if it had remained in the condition in which it was at the time possession was taken by the lessee, and its market value in the condition

> in which it was placed by the action of the defendant during the tenancy. Blosser v. Enderlin, 113 Ohio St. 121, 148 N.E. 393. The plaintiff is entitled to recover such amount as will fairly and reasonably compensate him for the damage done as provided by the terms of the lease. The cost of repairs may be admitted in evidence but only for the purpose of assisting in arriving at the fair and market value of the real estate at the times under consideration.

November 2, 1980, *Peevyhouse, supra,* was also applied in *Ruddach* v. *Don Johnston Ford, Inc.*, 621 P.2d 744-45 (Wash. App. 1980):

> A lessee who breaches a provision of the lease requiring him to make certain repairs or to deliver up the premises at the termination of the lease in a certain condition is liable in damages for the reasonable cost of making such repairs or of putting the premises in the condition prescribed by the lease.

Crystal Concrete Corp. v. Braintree, 309 Mass. 463, 470, 35 N.E.2d 672, 675 (1941).

> Cost of repairs is merely a convenient way to quantify the damages a lessor has suffered. Where the facts indicate that cost of repairs is unrelated to lessors' actual damage, the rule is not applied. Pennsylvania Cement Co. v. Bradley Contracting Co., 11 F.2d 687, 688 (2d Cir. 1926) (L. Hand, J.).
>
> "In an action for breach of contract, as opposed to a suit sounding in specific performance, the lessor is entitled only to the damages that were caused to the property by the failure to restore. Where the expense of restoration exceeds the diminution in the market value of the property caused by the lessee's nonperformance, the diminution in

> fair market value is the proper measure of damages." Dodge Street Building Corp. v. United States, 341 F.2d 641, 644, 169 Ct.Cl. 496 (1965). If the "cost of repair" rule will give lessors a greater benefit from the breach than could be gained from full performance, a different measure of damages must be applied to avoid injustice. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113 (Okl[a]. 1963). Accord, Giordano v. Brandywine Mushroom Corp., 32 Pa. Dist. & Co. [R.]2d 522, 525-26 (1963). And see Realty Associates v. United States, 138 F.Supp. 875, 134 Ct.Cl. 167 (1956).

Bowes v. *Saks & Co., supra* at 116-17.

This chronology of authorities makes clear that the rule of *Peevyhouse, supra,* is not an aberration subject to being discarded by a federal court sitting in diversity.

2. The *Peevyhouse* Rule Is Binding on the Federal Judiciary Sitting in Diversity.

Nearly fifty years ago, the United States Supreme Court ruled in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1189 (1937), that federal courts are bound to follow state law with respect to substantive rights in actions arising from diversity jurisdiction. Further, the pronouncements of that law by the highest state court are afforded the greatest weight, and are controlling without regard to whether or not the federal courts agree with the result or with the grounds of such decisions. *Williams* v. *Kaiser,* 323 U.S. 471, 473, 89 L.Ed. 398, 401 (1944); *Meredith* v. *Winter Haven,* 320 U.S. 228, 234, 88 L.Ed. 9, 13 (1943); Federal Practice and Procedure, 32 Am.Jur.2d §§ 294, 295.

The Court of Appeals acknowledged the binding effect of state supreme court cases when it decided the case at bar, but stated further that "we need not adhere to a decision if we think it no longer would be followed." (Appendix A, *infra*, at p. 6a). As evidenced by *Meredith*, *supra*, a federal court may not deviate from state law unless it can point with assurance to further developments of state law which indicate that the previous decisions of the state's highest court will not be followed.

The authorities relied upon in Judge Logan's decision either involve an actual change in the statutory or case law of the state in question, or decline to deviate from the established state law.

McKenna v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 665 (3rd Cir. 1980), dealt with conflicting state supreme court decisions with respect to the applicable state statute of limitations for medical malpractice actions, and expressly found that the more recent state supreme court decision constituted an abandonment by that court of the doctrine set forth in its previous decision. *McKenna*, *supra*, did not involve a speculative determination of the current state law. The highest state court had spoken on the matter, and the question was concluded insofar as the federal court was concerned. A contrary result would have been surprising in view of the express finding of the court regarding the controlling nature of state supreme court decision, an expression omitted from the Court of Appeals' opinion in the instant case (Appendix A, *infra*, at p. 6a-7a), which omitted language provides at 622 F.2d 662:

> The primary source that must be analyzed of course, is the decisional law of the Ohio Supreme Court. In

> the absence of authority directly on point, decisions by that court in analogous cases provide useful indication of the court's probable disposition of a particular question of law.

Here there is no absence of authority directly on point. The Oklahoma Supreme Court has expressly applied to a coal mining lease damage statutes which have existed in Oklahoma since the nineteenth century. The Oklahoma coal mining statutes have no impact upon the contractual relationships between Helmerich & Payne and Rock Island. It simply cannot be said with any assurance that the Oklahoma Supreme Court would no longer apply these long-standing damage statutes to the present controversy.

Hood v. *Dunn & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), likewise does not logically support the court's radical deviation from the established Oklahoma law on damages. In *Hood, supra*, the court recognized that federal courts are not immutably bound to follow state court decisions, but found that the case before it failed the strict test applicable to such federal independent judgment on matters of state law. 486 F.2d 25. Likewise, there exists no compelling reason for the long-standing legislative policy of Oklahoma to be held for naught by the federal court.

Judge Logan's opinion further relies upon *Warner* v. *Gregory*, 415 F.2d 1345, 1347 (7th Cir. 1969), wherein the court determined that an actual change in the applicable state statute had occurred. Thus, the federal court was able to say with some assurance that case law construing the old statute would no longer be followed. That is not true of the present case, and the settled law of Oklahoma on damages should not be abrogated by the federal judiciary.

Finally, *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967), declined to speculate that state law had changed, finding that the *Erie* doctrine prevented such engagement in local law-making.

The gist of these authorities is not that a federal court must slavishly adhere to discarded state precedents. Nonetheless, the Oklahoma Supreme Court in *Peevyhouse, supra,* spoke directly and forcefully on the very dispositive issue of this action. There is no compelling reason to abandon the Oklahoma controlling authority, and it simply cannot be said with any assurance that the Oklahoma Supreme Court would do so if faced with this controversy.

3. The Oklahoma Mining Statutes Do Not Abrogate the *Peevyhouse* Rule.

The Oklahoma law of damages is clear. Damages must in all cases be reasonable. One may not recover more for the breach of a contract than he would have gained by full performance thereof, without regard to the agreement of the parties. Recovery for injury to real property cannot under these facts exceed the diminution in value caused by the breach, and cannot in any event exceed the fair market value of the property fully restored. By its opinion of January 21, 1983, the Court of Appeals has ruled that these basic and long-standing damage rules do not apply to reclamation under a coal mining lease due to the enactment of the 1971 Oklahoma Mining Lands Reclamation Act, *supra.*

Nonetheless, it cannot be said with any assurance that the Oklahoma Supreme Court would so hold. The mining statute relied upon was enacted on June 12, 1971, more

than three years after the parties hereto entered into the subject lease, and could not possibly have altered the obligations of these parties. Additionally, the 1971 Mining Lands Reclamation Act, *supra*, was enacted prior to the express findings of the Oklahoma Supreme Court in *Western Natural Gas, supra*, and the Oklahoma Court of Appeals in *Conkin, supra*, that *Peevyhouse, supra*, is the law of Oklahoma. That Act was also passed prior to the findings of the District Court and Court of Appeals in *Hitchcock, supra*, that *Peevyhouse, supra*, is the law of Oklahoma. Therefore, the conclusion of Justice Logan that the 1971 mining statute changed the law of *Peevyhouse, supra* (Appendix A, *infra*, at p. 6a-7a), is simply without support, and constitutes an impermissible deviation from the Oklahoma law controlling in this controversy.

However, assuming that the mining statute is applicable to a determination of the contractual rights of the parties, the critical factual issue in making that determination is whether or not the mining statute requires the reclamation upon which the damage award of $375,000.00 was based. The record herein is conclusive and unrebutted that no such reclamation is required.

The testimony of Rock Island's own expert witness, Don Westhoff, with respect to the cost of reclamation, and the work included in that cost, reveals that approximately 88 percent of the $375,000.00, or $40,000.00 to $45,000.00, was attributable to "closing the last cut," in other words, draining and filling the pit and knocking down the high wall. It is undisputed and of record, however, that the 1971 Oklahoma Mining Lands Reclamation Act, *supra*, does not require closing the last cut where mineable coal remains in the ground.

May 1, 1967, the Oklahoma Legislature passed the Open Cut Land Reclamation Act, Laws 1967, ch. 186, § 1, *et seq.* (codified at 45 O.S. Supp. 1968, §§ 701-713). This Act provided for reclamation and conservation of land disturbed by open cut mining *after mining operations are completed.* The obligation to reclaim after mining was completed was placed solely on the operator, and no obligation was placed on the landowner, lessor or lessee.

June 12, 1971, the State of Oklahoma adopted the Mining Lands Reclamation Act, Laws 1971, Ch. 332, § 1, *et seq.* (codified at 45 O.S. 1981 §§ 721, *et seq.*), which repealed the Open Cut Land Reclamation Act, *supra.* Like its predecessor, the 1971 Mining Lands Reclamation Act, *supra,* provides for reclamation and conservation of lands *after mining,* placing the sole obligation on the operator, and not upon the landowner, lessor or lessee. This Act (set out in full as Appendix E, *infra*) provides in § 725(d) as follows:

> (d) The operator may construct earth dams to form lakes in pits resulting from surface mining operations, provided that the formation of lakes shall not interfere with other mining operations or damage property of others.

Under the 1971 Oklahoma Mining Lands Reclamation Act, *supra,* the Oklahoma Mine Inspector put out Invitations to Bid on Reclamation Jobs which provided, in part:

> 3. Open pits will be leveled and graded unless otherwise specified for water reservoir.

The Oklahoma Department of Mines distributes a brochure printed in 1974 reflecting how coal miners are to make reclamation under the 1971 Mining Lands Reclama-

tion Act, *supra*; and which shows as reclaimed land that has mineable coal left, a high wall and a water reservoir, with the coal seam ("button") protected.

In fact, Rock Island admitted in its Brief of Appellee to the Court of Appeals that the reclamation upon which damages were based in this case was not required by the state mining statutes, Brief of Appellee, p. 13:

> State law does not in every case require the filling in of open pits which may have been formed — the lease did.

It should also be noted that the mining statutes place no obligation on the landowner, lessor or lessee, but place the sole obligation to reclaim upon the operator, 45 O.S. 1981 § 723(k), as was recognized by the Court of Appeals (Appendix A, *infra*, at p. 5a).

Further, counsel for Rock Island stipulated at trial that the sole remdey for the failure to reclaim pursuant to the statute is the forfeiture of performance bonds, in accordance with the opinion of the Oklahoma Attorney General (Appendix F, *infra*, at p. 3f). That sole remedy has already occurred in this matter.

Finally, assuming the mining statute had any application here, the Trial Court excluded all evidence offered by Helmerich & Payne that showed compliance with the policy of the statute as to flora, fauna and quality of water.

Simply stated, then, Oklahoma law does not under these circumstances allow Rock Island to recover more than the diminution in value to this land, and in no event can it recover more than the fair market value of the property in damages for failure to reclaim. Nonetheless, while pur-

porting to apply the 1971 Oklahoma Mining Lands Reclamation Act, *supra*, the Court of Appeals has imposed upon Helmerich & Payne an excessive penalty of cost of reclamation five times the value of the property, and which would increase the value of the surface by only $6,797.00, based upon reclamation that is not required by the Act. To apply the Oklahoma law of damages is not, as Judge Logan's opinion suggests, to assume that the reclamation cause of the lease was to have no force (Appendix A, *infra*, at p. 7a). There was never any question that the reclamation provision was fully effective, nor that Helmerich & Payne was liable to Rock Island for the breach of that provision. Nonetheless, the measure of damages for that breach as established by Oklahoma statute and the decisions of the Oklahoma Supreme Court is the diminution in value occasioned by the falure to reclaim, and cannot, in any event, exceed the fair market value of the property fully restored.

4. The Question of the Continuing Applicability of *Peevyhouse* Should Be Certified to the Oklahoma Supreme Court.

McKenna, supra, cited in Judge Logan's opinion, urges a determination of the applicable Oklahoma law at 622 F.2d 661 n. 15:

> It is regrettable that Ohio has not yet established a certification procedure that would enable this Court to obtain a definitive answer to the crucial question in this case from the Ohio Supreme Court. The United States Supreme Court has expressed its approval of such a procedure.

See also Lehman Bros. v. *Schein*, 416 U.S. 386, 390-91, 394-95, 94 S.Ct. 1741, 1743-44, 1745-46, 48 L.Ed.2d 215, 220 (1974).

Oklahoma has such a certification procedure, Uniform Certification of Question of Law Act, 20 O.S. 1981, § 1602. This Court should certify to the Oklahoma Supreme Court whether or not *Peevyhouse* is still the law of Oklahoma. It is true that no such request had been made in these proceedings prior to Helmerich & Payne's motion denied by the Court of Appeals February 23, 1983 (Appendix B, *infra*). However, the need or desirability of doing so was not an issue in this lawsuit until the Court of Appeals' decision of January 21, 1983, as at no time did the Trial Court rule, or even suggest, that *Peevyhouse* was no longer the law of Oklahoma. Helmerich & Payne does not believe that the Oklahoma Supreme Court would allow the recovery of damages for injury to real property which exceed by more than 490 percent the actual market value of that property. If the long-standing policy of the state is now to be cast aside, such a decision should be that of the Oklahoma Supreme Court, rather than a federal appeals court sitting in another state.

CONCLUSION

The elementary principles of damages, abandoned by the Court of Appeals herein, were espoused by no lesser jurists than Judge Cardozo in *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 129 N.E. 889 (1921), quoted in *Bowes* v. *Saks & Company, supra;* and by Justice Learned Hand in *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 11 F.2d 687 (2d Cir. 1926), quoted in *Ruddach, supra.* Yet, the Opinion of the Court of Appeals casts aside all authority in determining, for the State of Oklahoma, what its law with re-

spect to damages shall be. It is true that no individual's sacred liberties are here at stake, nor is any pressing Constitutional issue presented. Still, we are a country of laws, and wisdom may be found in the words of Justice White in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U.S. 429, 652, 39 L.Ed. 759, 844 (1895) (White, J., dissenting):

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great Constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In ordering the affairs of their business and everyday lives, the citizens of Oklahoma have a right to rely upon the continuity of its laws. The Oklahoma Supreme Court recognized *Peevyhouse, supra,* as the law of Oklahoma after the 1971 Oklahoma Mining Lands Reclamation Act, *supra,* was enacted by the Legislature. Now, the Court of Appeals herein has usurped the right and duty of the Oklahoma courts by rejecting *Peevyhouse, supra.* The Court of Appeals rationalizes this result by noting that *Peevyhouse, supra,* contained a strong dissent (Appendix A, *infra,* at p. 6a). In fact, the Court of Appeals has done nothing other than set aside the reasoned and express opinion of the Oklahoma Supreme Court, and adopt for the State the minority view of the controlling decision by the State's highest

court. Such encroachment on local law-making was condemned in *Erie, supra,* and should not be allowed to stand.

The January 21, 1983 Opinion of the Court of Appeals does not cite a single case from anywhere in the United States, much less from Oklahoma, which has allowed such a windfall recovery. The damage award is grossly disproportionate to the benefit Rock Island would have gained by full performance, unreasonably excessive, and in no sense advances the interests of the people of the State of Oklahoma. If Rock Island had wished the land reclaimed, it could have sued for specific performance. *Bowes* v. *Saks & Co., supra.* Having sued for damages, it should be bound by state law as a limit on its recovery. Rock Island has neither the obligation nor the incentive to use the award to reclaim this land. In fact, the only evidence adduced at trial was that they did not intend to do so, but instead were seeking to lease it again for further mining of the substantial coal deposits remaining, as the highest and best use of the land.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in Rock Island Improvement Co. v. Helmerich & Payne, Inc., v. Sam Sexton, Jr.; No. 81-1080. In the event that the Petition is granted, Petitioner prays that the judgment of the Court of Appeals below be reversed, that the cause be remanded, and that the Court of Appeals be directed to render an Opinion in conformity with the findings of this Court. Additionally, should this Court find reason to believe that *Peevyhouse, supra,* may no longer be the

law of Oklahoma, Petitioner prays that the question be certified to the Oklahoma Supreme Court for such a determination.

Respectfully submitted,

JAMES R. EAGLETON
MARC F. CONLEY
HOUSTON AND KLEIN, INC.
3200 University Tower
1722 South Carson
P.O. Box 2967
Tulsa, Oklahoma 74101
(918) 583-2131

Attorneys for Petitioner,
Helmerich & Payne, Inc.

April, 1983

CERTIFICATE OF SERVICE

I, James R. Eagleton, a member of the Bar of the Supreme Court of the United States and counsel of record for Helmerich & Payne, Inc., Petitioner herein, hereby certify that on the ..... day of ....., 1983, pursuant to Rule 28 of the Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties required to be served herein as follows:

On Rock Island Improvement Company, the Respondent herein, by mailing the copies in duly addressed envelopes, with first-class postage prepaid, to John R. Cain, counsel of record for Rock Island Improvement Company, at his office at 880 City National Bank Tower, Oklahoma City, Oklahoma 73102; and on Judge David L. Russell, counsel on brief for Rock Island Improvement Company, at his office at Federal Building, Oklahoma City, Oklahoma 73102.

On Sam Sexton, Jr., Third Party Defendant herein, by mailing the copies in a duly addressed envelope, with first-class postage prepaid, to Sam Sexton, Jr., appearing *pro se,* at his office at P.O. Box 1526, Fort Smith, Arkansas 72902.

All parties required to be served have been served.

James R. Eagleton
Counsel for Petitioner

APPENDIX A

PUBLISH

[Filed Jan. 21, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROCK ISLAND IMPROVEMENT COMPANY, Plaintiff-Appellee,	)	
v.	)	
HELMERICH & PAYNE, INCORPORATED, Defendant-Appellant Third Party Plaintiff,	)	No. 81-1080
v.	)	
SAM SEXTON, JR., Third Party Defendant.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 79-20-C)

James R. Eagleton (Marc F. Conley with him on the briefs), of Eagleton, Eagleton & Owens, Tulsa, Oklahoma, for Defendant-Appellant.

John R. Cain (David L. Russell of Benefield & Russell on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

[APPENDIX]

LOGAN, Circuit Judge.

In this diversity case Helmerich & Payne, Inc. appeals a jury verdict in favor of Rock Island Improvement Company for breach of contract and appeals the trial court's denial of its motions for judgment nowithstanding the verdict and for a new trial or amendment of the judgment.

From 1968 to 1977 Hemerich & Payne leased two tracts of land in Oklahoma from Rock Island for coal mining purposes. These tracts are referred to as the "Rees-Heavener" and "Rees-Petros" mines. The lease contained a reclamation clause that stated: "Upon the abandonment of completion of any mining operation, or part thereof, including but not limited to any strip operation, the surface shall be restored as nearly as possible to its condition prior to said mining operation . . . ." Helmerich & Payne subleased the land to Sam Sexton, Jr., who used stripmining techniques to remove substantial amounts of coal. When the lease period ended, the tracts were left with two strip pits and were not otherwise reclaimed to Rock Island's satisfaction. Rock Island sued Helmerich & Payne for breach of the lease's reclamation provision, seeking damages equal to the amount necessary to reclaim the land. Helmerich & Payne filed a third party complaint against Sexton, who agreed to pay any judgment won by Rock Island. The jury awarded Rock Island $375,000.

On appeal the issues may be classified under the following headings: (1) the applicable Oklahoma damages law, (2) the admissibility of testimony by Rock Island's experts, (3) the excessiveness of the damages, (4) the fairness of the trial, (5) the assessment of damages for land that the State of Oklahoma had condemned, and (6) the crediting against the judgment, as stipulated by the parties, of $50,000 that Sexton had forfeited to Oklahoma.

I

Helmerich & Payne contends that the trial court improperly applied Oklahoma damages law. In instructing

the jury on damages,[1] the trial court relied on *Peevyhouse* v. *Garland Coal & Mining Company*, 382 P.2d 109 (Okla.), *cert. denied*, 375 U.S. 906 (1963). In *Peevyhouse* the Oklahoma Supreme Court examined a coal mining lease requiring the lessee to reclaim any land it stripmined. At issue was whether the proper measure of damages for the lessee's failure to reclaim was the cost of performance ($29,000) or the diminution in the fair market value of the land ($300). The court held that the proper measure of damages was the reasonable cost of reclamation, unless the reclamation requirement was incidental to the lease's main purpose and the cost of reclamation would be grossly disproportionate to the diminution in the land's fair market value. In the latter case, the lessor's damages were limited to the diminution in value. *Id.* at 114.

In the instant case the trial court submitted the issue of the reclamation clause's importance to the jury. We have held that a trial court must submit this issue to the jury when the parties have introduced extrinsic evidence of their intent, *Hitchcock* v. *Peter Kiewit & Sons Co.*, 479 F.2d 1257 (10th Cir. 1973); otherwise, the trial court should treat interpretation of the contract clause as a matter of law. *See Walker* v. *Telex Corp.*, 583 P.2d 482, 485 (Okla.

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[1] The trial court instructed the jury as follows:

"The measure of damages is the reasonable cost of performing the contract, or in this case, restoring the land to the same condition it was in before stripmining, unless you find:

1. That the lease provision requiring restoration of Plaintiff's land to the same condition it was in before stripmining was merely incidental to the main purpose of the lease; and
2. That the economic benefit to the Plaintiff by restoring the land would be grossly disproportionate to the cost of restoring the land.

"Then, if you so find, the amount of damages to which Plaintiff is entitled is the reduced value of Plaintiff's land, that is, the difference between the present fair market value of the land as it is, and the present fair market value of the land restored to the same condition it was in before the stripmining."

1978). Neither Rock Island nor Helmerich & Payne introduced evidence establishing the parties' intent in including the restoration clause.[2] Therefore, the trial court should not have submitted interpretation of the contract to the jury.

Helmerich & Payne asserts the trial court should have held that the lease unambiguously focused upon coal mining as its main purpose and that reclamation was merely an incidental purpose. Furthermore, Helmerich & Payne argues that because the parties stipulated the diminution in value of the land was $6,797, and the evidence presented showed that restoring the land would cost $375,000, the court should have held the cost of reclamation was disproportionate to the diminution in land value. Thus, following *Peevyhouse*, the proper measure of damages would be diminution in market value, an amount the parties stipulated, and thus not a jury issue. Rock Island's response is that *Peevyhouse* no longer represents Oklahoma law on damages for breach of mining contracts because of subsequent developments in that state's policy toward reclamation.

At the time the parties in *Peevyhouse* entered into their lease, Oklahoma had no stated policy concerning land reclamation after mining operations. Thus, in *Peevyhouse* the court considered only the economic benefits to the parties of a situation the court termed "artificial," "un-

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[2] Helmerich & Payne attempted to introduce a letter it had received from an agent of Rock Island's parent corporation one year before the lease became effective, as relating to the issue of Rock Island's understanding of the meaning of the reclamation clause. The trial court excluded the letter as not clearly relating to the contract in question and as being potentially confusing to the jury. Helmerich & Payne asserts that the trial court erred in excluding this letter as extrinsic evidence. Rulings regarding the admission of evidence fall within the trial court's discretion and will not be disturbed on appeal unless clearly erroneous. *Keen* v. *Detroit Diesel Allison*, 569 F.2d 547, 549 (10th Cir. 1978). We have read the letter and have determined that the trial court did not abuse its discretion.

reasonable," and "unrealistic": that a property owner would agree to pay a great deal for "improvements" that would increase the property's value by only a small amount. The court was concerned that if the landowner did not spend the large amount to reclaim the land, he would receive a windfall by recovering the amount from the lessee. 382 P.2d at 112.

However, after the decision in *Peevyhouse* but before Rock Island leased the tracts to Helmerich & Payne, Oklahoma enacted the Open Cut Land Reclamation Act. 1967 Okla. Sess. Laws Ch. 186 (current version at Okla. Stat. Ann. tit 45, §§ 721-792). The Act stated in part:

> "It is hereby declared to be the policy of this State to provide, after mining operations are completed, for the reclamation and conservation of land subjected to surface disturbance by open cut mining and thereby to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this State."

Id. at § 2 (current version at Okla. Stat. Ann. tit 45, § 722).

The statute declares today, as it did in 1967, that the operator of a strip mine has a duty to reclaim the land and that the state may contract for the work to be done if the operator defaults. The statute makes no exception for cases in which the expenditures for reclamation are disproportionate to the resulting increase in value of the land. To be sure the statute looks to the operator as the party responsible for reclamation, and limits the state's recovery to the amount of the bond it has required.[3] Nevertheless,

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[3] At the time of the Rock Island-Helmerich & Payne contract the maximum bond required was $50 per acre. Today there is no maximum; the bond must cover the estimated reclamation costs. Okla. Stat. Ann. tit 45, § 728(B).

there are many reasons a landowner in Rock Island's position would want a reclamation provision in the lease — to enhance its image in the community, to protect against possible tort liability for conditions on its premises, and to allay any fear that under the recently enacted law it might somehow be held responsible for defaults of the operator. There are reasons a lessee might readily accept such a provision — it already has a duty to reclaim under the state statute.

We are convinced that the Oklahoma Supreme Court would no longer apply the rule it established in *Peevyhouse* in 1963 if it had the instant dispute before it. *Peevyhouse* was a 5-4 decision with a strong dissent.[4] More importantly, the public policy of the state has changed, as expressed in its statutes. Although we are bound by decisions of a state supreme court in diversity cases, we need not adhere to a decision if we think it no longer would be followed.

> "An accurate forecast of [a state's] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. . . . It is important to note, however, that our prediction 'cannot be the product of a mere recitation of previously decided cases.' In determining state law, a federal tribunal should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' Rather, relevant state precedents must be scrutinized with an eye toward the

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[4] *Peevyhouse* has been cited in only two Oklahoma Supreme Court cases. In *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236, 1249 (Okla.), *cert. denied*, 409 U.S. 1052 (1972), it was held to be inapplicable to the facts before the court. In *State ex rel. Cartwright* v. *Dunbar*, 618 P.2d 900, 911 (Okla. 1980), its supplemental opinion on rehearing was cited for an unrelated point of constitutional law.

broad policies that informed those adjudications, and to the doctrinal trends which they evince."

McKenna v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). *Accord Hood* v. *Dun & Bradstreet, Inc.*, 486 F.2d 25, 31 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Warner* v. *Gregory*, 415 F.2d 1345, 1346 (7th Cir. 1969), *cert. dismissed*, 397 U.S. 930 (1970); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967). When the parties negotiated the contract in question, they expressly included a reclamation clause and required the lessee to bear the cost of reclamation. Given the attention focused by Oklahoma on the importance of reclaiming stripmined lands, it is more logical to assume that the parties meant what they said, calculated their costs and benefits under the contract accordingly, and intended the provision to insure proper reclamation of the land, than it is to assume that they expected the reclamation clause to have no force.[5]

Even though the trial court should not have submitted the issue of the reclamation clause's importance to the jury, we need not reverse. Because we hold that cost of performance is the proper measure of damages, and the jury used this measure in calculating damages, the court's error is harmless.

II

The trial court denied Helmerich & Payne's motion to strike Rock Island's expert witness' testimony that the cost of restoring the land as nearly as possible to its original

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[5] In *Peevyhouse* the court relied in part on Oklahoma damages statutes requiring that a party receive no more in damages than it would have gained by full performance. See 382 P.2d at 113 (citing Okla. Stat. Ann. tit. 23, §§ 96, 97). Helmerich & Payne contends that these statutes limit the amount of its damages. Because the anticipated cost of reclamation may have affected the contract price, these damages statutes do not preclude use of the cost-of-performance measure of damages.

condition would be $375,000. Helmerich & Payne claims that the expert's testimony should have been disregarded because on cross-examination the expert inadequately disclosed the underlying facts for his opinion. *See* Fed R. Evid. 705. Specifically, it complains that the expert did not know how many acres would be reclaimed under his estimate. Although the expert admitted he could only guess the number of acres to be reclaimed, he testified that he had measured the strip pits in feet to calculate his estimate and that when the pits were filled the spoils areas (hills of surface material that had been removed to gain access to the coal) would have been graded and leveled. Since the bulk of the expert's estimate concerned filling the pits, the total number of acres involved was a minor element in figuring the cost of reclamation. He testified that his reclamation estimate included filling in the pits, grading and leveling the spoils, and revegetating. The expert also testified about his prior experience in reclaiming mined lands. Based upon these disclosures, we cannot find that the trial court erred in denying the motion to strike.

Helmerich & Payne also maintains that the expert's estimate cannot support the verdict because it included work that was not required by the lease: filling the pit on the Rees-Heavener tract and grading and leveling the Rees-Petros tract.[6] Helmerich & Payne asserts that the lease did not require filling the pit on the Rees-Heavener tract because Sexton had fulfilled Helmerich & Payne's duty to restore the surface by reclaiming another pit and spoils area on the same tract that had been left over from previous

[6] Additionally, Helmerich & Payne asserts that the expert included this work in his estimate because of an erroneous interpretation of state law given him by the Oklahoma Deputy Chief Mine Inspector. Because Rock Island sought recovery only for breach of the lease reclamation clause, the state law requirements are irrelevant here. We have read the expert's testimony and find that it is consistent with the scope of the lease reclamation clause.

mining. Furthermore, Helmerich & Payne maintains that Sexton had already graded and leveled the Rees-Petros tract as nearly as possible to its prior condition.

In assessing damages the jury could properly consider Rock Island's expert's estimate, which included filling and grading the new pit on the Rees-Heavener tract and restoring the Rees-Petros tract. The lease stated, "[T]he surface shall be restored as nearly as possible to its condition prior to [the] mining operation." The extent and cost of restoration required by the lease was the heart of this litigation, and the lease arguably required the work Rock Island's expert included in his estimate. Although Helmerich & Payne had no duty under the lease to reclaim the previously mined area, nothing in the lease indicates that it could fulfill its duty to reclaim the surface area it disturbed on a tract by reclaiming a different part of the tract. Helmerich & Payne neither sought restitution for reclaiming the previously mined area nor submitted evidence of the cost of that reclamation. Similarly, the expert's opinion that $25,000 would pay for leveling and grading the Rees-Petros tract related to the parties' dispute over how much restoration that tract required.

III

Helmerich & Payne contends that reasonable damages fall in the range of $40,000 to $65,000 for regrading the spoils area and that the $375,000 verdict, which included regrading and filling the strip pits, was excessive. Helmerich & Payne argues that in these circumstances the court should have ordered a new trial. In reviewing a trial court's refusal to grant a motion for a new trial because of an excessive verdict, we apply the abuse of discretion standard. *Garrick* v. *City and County of Denver*, 652 F.2d 969, 971 (10th Cir. 1981). We cannot say that the jury or trial court erred by interpreting the reclamation clause to include filling the pits. Furthermore, because testimony of Rock Island's expert witness supports the $375,000 verdict, the trial court did not abuse its discretion in denying the motion.

IV

Helmerich & Payne raises a number of complaints concerning evidentiary rulings and instructions that it contends rendered the trial unfair. It claims that the court improperly instructed the jury on Helmerich & Payne's obligation to reclaim the land under the lease. The trial court instructed the jury that the lease required Helmerich & Payne to restore the surface of Rock Island's land "to the same condition it was in before the coal was strip mined." The lease required restoration of the surface "as nearly as possible to its condition prior to [the] mining operation." The pretrial order included as an issue for trial, "Is it reasonably possible to restore the surface of subject real property to the condition it was on April 8, 1968, and the cost thereof." Helmerich & Payne claims error in the instruction's omissions of the lease language "as nearly as possible" and of the pretrial language of a "reasonable" possibility of restoration. Helmerich & Payne concedes that restoration is possible, but asserts that it agreed to restore the land only as nearly as possible or as reasonably possible and that spending $375,000 to restore land whose value will thereby be increased by less than $7,000 is not reasonably possible. Helmerich & Payne is merely rearguing the proper measure of damages, an issue we have already resolved against it.

Helmerich & Payne correctly argues that the trial court erred in instructing the jury on the diminution in value of the land by focusing on the land's value at the time the jury was deciding the issue, rather than on its value at the end of the lease term. However, the error was harmless because we have already determined that the cost of reclaiming the land was the proper measure of damages.

Helmerich & Payne also alleges that the trial court erred (1) in excluding extrinsic evidence of the reclamation clause's meaning, testimony concerning lease payments to Rock Island, land records whereby Rock Island acquired the land it leased to Helmerich & Payne, and evidence of the land's present condition; (2) in admitting the sublease reclamation provision and Sexton's applications to the Okla-

homa Department of Mines for mining permits; (3) in instructing the jury on the Oklahoma reclamation statutes and on waiver and estoppel; and (4) in permitting certain testimony of witnesses and certain statements of counsel. Finally, Helmerich & Payne maintains that the errors collectively deprived it of a fair trial. After reading the record and considering Helmerich & Payne's contentions separately and collectively, we conclude that the trial was fair and that the trial court committed no error justifying reversal.

V

Helmerich & Payne contends that the trial court should have granted its motion to amend the pretrial order to permit adding the issue whether Rock Island could recover damages for land condemned by Oklahoma. Helmerich & Payne sought to add this issue less than one month before trial. From the record it appears that Oklahoma filed an action on February 22, 1974 to condemn 13.35 acres of the land at issue in this lawsuit. By the time of trial the state apparently had not taken possession, although on May 1, 1974, the state paid into court an amount covering assessed value and costs. The Helmerich & Payne attorney who signed the motion and supporting memorandum stated he had had no knowledge of the condemnation action before October 10, 1980. Sexton did not indicate whether he was aware of the condemnation, but he supported the motion, claiming Rock Island should not recover for damage to land it did not own. Rock Island opposed the motion asserting that the motion raised a new issue on the eve of trial, that both Helmerich & Payne and Sexton were aware of the condemnation proceedings and were involved in negotiations with the condemnor, and that the condemnation proceedings were irrelevant because they had never been completed, negotiations were ongoing, and Rock Island still held legal title to the land. The trial judge gave no reason for denying the motion to amend.

A pretrial order controls the subsequent course of the suit unless the trial court modifies it to prevent manifest

injustice. *See Seneca Nursing Home* v. *Secretary of Social and Rehabilitation Services of Kansas*, 604 F.2d 1309, 1314 (10th Cir. 1979); Fed. R. Civ. P. 16. Here the trial court's refusal to modify the pretrial order did not create manifest injustice. In *Epperson* v. *Johnson*, 190 Okla. 1, 119 P.2d 818 (1941), an Oklahoma condemnor filed condemnation proceedings and paid the commissioners' assessment into court. Applying constitutional and statutory provisions substantially similar to those applicable to the condemnation of the Rock Island property, the Oklahoma Supreme Court found that the condemnor did not take title to the property simply by paying the commissioners' award into court. 119 P.2d at 823; *accord Board of Commissioners* v. *Rayburn*, 192 Okla. 694, 138 P.2d 820, 822 (1943); *State ex rel. Department of Highways* v. *Waters*, 376 P.2d 288, 290-91 (Okla. 1962); *Oklahoma Turnpike Authority* v. *Dye*, 208 Okla. 396, 256 P.2d 438, 441-42 (1953). In the case before us, Helmerich & Payne does not contend that the state took possession of the land. To the contrary, after the condemnation was filed, Helmerich & Payne subleased this land, received royalties from the sublessee for mining coal on the land, and paid Rock Island royalties for coal. Accordingly, the trial judge did not prejudice Helmerich & Payne by denying its motion to amend the pretrial order.

VI

Finally, Helmerich & Payne contends that the trial court erred in failing to amend the judgment to give credit for Sexton's forfeiture to Oklahoma of $50,000 in performance bonds. The parties stipulated at pretrial that Helmerich & Payne would be credited in this amount and reaffirmed the stipulation in the briefs on appeal and at oral argument. The trial court should have amended the judgment to reflect the stipulation.

Subject to the modification of $50,000 credited to Helmerich & Payne as stipulated by the parties, the judgment is AFFIRMED.

APPENDIX B

JANUARY TERM — February 23, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

ROCK ISLAND IMPROVEMENT CO.,	)	
Plaintiff-Appellee,	)	
vs.	)	
HELMERICH & PAYNE, INC.,	)	No. 81-1080
Defendant-3rd Party	)	
Plaintiff-Appellant,	)	
vs.	)	
SAM SEXTON, JR.,	)	
Third-Party Defendant	)	

This matter comes on for consideration on appellant's petition for rehearing and suggestion for rehearing in banc, and the motion to certify question to the Oklahoma Supreme Court.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

The motion to certify question to the Oklahoma Supreme Court is denied.

HOWARD K. PHILLIPS, Clerk
By (s) *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX C

[Filed Nov. 12, 1980]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

ROCK ISLAND IMPROVEMENT CO.,
Plaintiff,
-vs-
HELMERICH AND PAYNE, INC.,
Defendant,
-vs-
HELMERICH AND PAYNE, INC.,
Third-Party Plaintiff,
-vs-
SAM SEXTON, JR.,
Third-Party Defendant.

No. 79-20-C

We, the Jury, duly empaneled and sworn, upon our oaths, find in favor of the plaintiff, Rock Island Improvement Co., and against the defendant, Helmerich and Payne, Inc., and assess recovery for plaintiff at $375,000.

11-12 , 1980 (s) *Ronald S. Price*
(Date) (Foreman)

APPENDIX D

[Filed Nov. 12, 1980]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-20-C

ROCK ISLAND IMPROVEMENT CO., (Plaintiff) vs. HELMERICH & PAYNE, INC. (Defendant & Third Party Pltf.) vs. SAM SEXTON, JR. (Third Party Defendant)	JUDGMENT

This action came on for trial before the Court and a jury, Honorable Frank H. Seay, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Plaintiff, Rock Island Improvement Co., recover of the Defendant, Helmerich & Payne, Inc., the sum of $375,000.00.

It is further Ordered and Adjudged that Third Party Plaintiff, Helmerich & Payne, Inc., recover of the Third Party Defendant, Sam Sexton, Jr., the sum of $375,000.00.

Dated at Muskogee, Oklahoma, this 12 day of November, 1980.

(s) *Lewis Vaughn*
Clerk of Court

APPENDIX E

45 O.S. 1971 § 721, *et seq.*
THE MINING LANDS RECLAMATION ACT

§ 721. *Short title*

This act may be known and cited as "The Mining Lands Reclamation Act".

§ 722. *Declaration of policy*

It is hereby declared to be the policy of this state to provide for the reclamation and conservation of land subjected to surface disturbance by mining and thereby to preserve natural resources, to encourage the productive use of such lands after mining, to aid in the protection of wildlife and aquatic resources, to encourage the planting of trees, grasses and other vegetation, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, to aid in the prevention of erosion, landslides, floods and the pollution of waters and air, to protect the natural beauty and aesthetic values in the affected areas of this state, and to protect and promote the health, safety and general welfare of the people of this state.

§ 723. *Definitions*

Whenever used or referred to in this act, unless a different meaning clearly appears from the context:

(a) "Overburden" means all of the earth and other materials which lie above natural deposits of minerals, and also means such earth and other materials disturbed from their natural state in the process of surface mining.

(b) "Mine" means an underground or surface excavation and development with or without shafts, slopes, drifts or tunnels for the extraction of minerals, with hoisting or haulage equipment and appliances for the extraction thereof, and shall embrace any and all of the land or

property of the plant, and the surface and underground, that contribute directly or indirectly to the Mining properties, concentration or handling of minerals.

(c) "Mining" means the extraction of minerals from natural deposits by any method or process.

(d) "Minerals" means asphalt, clay, coal, copper, granite, gravel, gypsum, lead, marble, salt, sand, shale, stone, tripoli, volcanic ash and zinc, or any other substance commonly recognized as a mineral, and includes ores or rock containing any such substances, but excludes oil, gas and any other mineral found naturally in a liquid or gaseous state.

(e) "Underground mining" means those mining operations carried out beneath the surface by means of shafts, slopes, tunnels or other openings leading to the mineral being mined and the extraction of the mineral through such shafts, slopes, tunnels or their openings.

(f) "Surface mining" means those mining operations carried out on the surface, including strip mining, auger mining, quarrying, dredging, pumping, or the use of hydraulic methods. Surface mining shall not include excavation or removal of shale, sand, gravel, clay, rock or other materials in remote areas by an owner or holder of a possessory interest in land for the primary purpose of construction or maintenance of access roads to or on such landowner's property. Surface mining shall not include excavations or grading conducted for forming, on-site road construction or other on-site construction, or the extraction of minerals other than anthracite and bituminous coal by a landowner for his own noncommercial use from land owned or leased by him; nor the extraction of such non-coal minerals for commercial purposes in an amount less than five hundred (500) tons per acre of aggregate or mass of mineral matter in any permit year; nor the extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes, so long as such work is per-

formed under a bond, contract and specifications which substantially provide for and require reclamation of the area affected in the manner provided by this act; nor to the handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(g) "Strip mining" means those mining operations carried out by removing the overburden lying above natural deposits of minerals, and mining directly from such natural deposits thereby exposed, but excludes auger mining, quarrying, dredging, pumping or the use of hydraulic methods.

(h) "Reclamation" means conditioning affected land to make it suitable for any uses or purposes consistent with those enumerated in 45 O.S.1971, § 722, and to avoid, minimize or correct adverse environmental effects of mining operations.

(i) "Box cut" means the first open cut in strip mining which results in the placing of overburden on unmined land adjacent to the initial pit and outside the area to be mined.

(j) "Consolidated material" means material of sufficient hardness or ability to resist weathering and to inhibit erosion or sloughing.

(k) "Operator" means any person, partnership, firm or corporation engaged in and controlling a mining operation.

(l) "Pit" means a tract of land from which overburden or minerals have been or are being removed in the process of surface mining.

(m) "Affected land" means the area of land from which overburden shall have been removed, or upon which overburden or refuse has been deposited, or both.

(n) "Refuse" means all waste material directly connected with the production, cleaning or preparation of minerals which have been mined by either underground or surface mining method.

(o) "Ridge" means a lengthened elevation of overburden created in the surface mining process.

(p) "Peak" means a projecting point of overburden created in the surface mining process.

(q) "Department" means the office of the Chief Mine Inspector, herein called the Department of Mines and Mining, or such department, bureau or commission as may lawfully succeed to the powers and duties of such department.

(r) "Director" means the Chief Mine Inspector of the State of Oklahoma or such officer, bureau or commission as may lawfully succeed to the powers and duties of such Chief Mine Inspector.

§ 724. *Permits — Application — Bond*

(a) It shall be unlawful for any operator to engage in any mining operations in this state without first obtaining from the Department a permit to do so for each separate mining operation in such form as is hereinafter provided. The Department shall determine what constitutes a separate mining operation by rules and regulations promulgated under this act.

(b) Any operator desiring to engage in surface mining shall make written application to the Department for a permit. Application for such permit shall be made upon a form furnished by the Department, which form shall contain a description of the tract or tracts of land and the estimated number of acres thereof to be affected by surface mining by the operator until the next succeeding June 30, which description shall include the section, township, range and county in which the land is located and shall otherwise describe the land with sufficient certainty so that it may be located and distinguished from other lands, and a statement that the operator has the right and power by legal estate owned to mine by surface mining the land so described.

(c) Any operator desiring to engage in underground mining shall make written application to the Department for a permit. Application for such permit shall be made upon a form furnished by the Department, which form shall contain a description of the tract or tracts of land to be used as refuse disposal areas until the next succeeding June 30, which description shall include the section, township, range and county in which the land is located and shall otherwise describe the land with sufficient certainty so that it may be located and distinguished from other lands, and a statement that the applicant has the right and power by legal estate owned to use the land so described as a refuse disposal area.

(d) Each application for a permit under subsections (b) and (c) of this section shall be accompanied by a plan of reclamation of the affected land that meets the requirements of this act, and shall set forth the proposed use to be made of the affected land, the grading to be accomplished, the type of revegetation, and shall include the approximate time of grading and initial revegetation effort.

(e) Each application for a permit under subsections (b) and (c) of this section shall be accompanied by the bond or security meeting the requirements of Section 8 of this act, or proof that such bond or security is still in effect, and a fee of Fifty Dollars ($50.00), which shall be deposited in the General Revenue Fund of the State Treasury.

(f) Upon the receipt of such application, bond or security and fee due from the operator, the Department shall issue a permit to the applicant which shall entitle him to engage thereafter in mining on the land therein described until the next succeeding June 30, the period for which such permits are issued being hereafter referred to as the "permit year". Except in the case of permits for new mining operations commenced after the effective date of this act, all applications for permits shall be filed between June 1 and June 30 of each year.

(g) An operator desiring to have his permit amended to cover additional land may file an amended application with the Department. Upon receipt of the amended application, and such additional bond as may be required under the provisions of this act, the Department shall issue an amendment to the original permit covering the additional land described in the amended application, without the payment of any additional fee.

(h) An operator may withdraw any land covered by a permit, deleting affected land therefrom, by notifying the Department thereof, in which case the penalty of the bond or security filed by such operator pursuant to the provisions of this act shall be reduced proportionately.

(i) Permits issued hereunder to an operator shall not be transferable to another operator.

§ 725. *Procedure for reclaiming land*

(a) All affected land other than lands affected by coal mining operations shall be reclaimed as provided in this section.

(b) The operator shall determine which parts of the affected land shall be reclaimed for forest, pasture, crop, horticultural, homesite, recreational, industrial or other use including food, shelter and ground cover for wildlife.

(c) All ridges and peaks of overburden created by surface mining shall be graded to a rolling topography traversable by machines or equipment customarily used in connection with the use to be made of the land after reclamation, but such slopes need not be reduced to less than the original grade of the area prior to mining, and the slope of the ridge of overburden resulting from a box cut need not be reduced to less than twenty-five (25) degrees from horizontal. Surface mining operations conducted in the flood plains of streams and rivers and subject to periodic flooding shall be exempt from the grading requirements of this section.

(d) The operator may construct earth dams to form lakes in pits resulting from surface mining operations, provided that the formation of lakes shall not interfer with other mining operations or damage property of others.

(e) The operator shall cover the exposed face of a mineral seam, where significant concentrations of acid-forming materials are present, to a depth of not less than three (3) feet with earth that will support plant life or with a permanent water impoundment.

(f) The operator shall grade down the banks of any pits or depressions created by the removal of sand or gravel by surface mining to a degree of slope determined by the Department, which shall give due consideration to the natural topography of the land affected and adjacent lands, the composition of such banks and the most beneficial use of the pits and depressions comprising the affected land after reclamation.

(g) All affected land except that which is to be covered with water or used for homesites or industrial purposes shall be revegetated by the planting of seeds, plants, trees, shrubs or other plantings appropriate to the use to be made of the land as determined by the operator. No planting of any kind shall be required on any affected land so long as the chemical and physical characteristics of the soil of such affected land are toxic, deficient in plant nutrients or composed of sand, gravel, shale or stone to such an extent as to seriously inhibit plant growth. The Department may prescribe by rules and regulations the required density of such plantings, and may make replanting requirements.

(h) Except where prevented by weather conditions, all grading shall be completed within one year after mining of the affected land has been completed. Initial seeding of planting shall be made at the first appropriate time following completion of grading. If the operator is unable to acquire sufficient planting stock of desired species from

state nurseries, or acquire such species elsewhere at comparable prices the Department shall grant the operator an extension of time until planting stock is available to plant such land as originally planned.

§ 726. *Refuse disposal areas*

All refuse disposal areas shall be reclaimed or treated or the refuse be contained by the operator to avoid adverse environmental effects.

§ 727. *Inspection*

The Department, or its accredited representatives, may enter upon the lands of the operator at all reasonable times, for the purpose of inspection, to determine whether the provisions of this act have been complied with.

§ 728. *Bond — Cash deposit*

(a) Any bond herein provided to be filed with the Department by the operator shall be in such form as the Director prescribes, payable to the State of Oklahoma, conditioned that the operator shall faithfully perform all requirements of this act and comply with all rules of the Department made in accordance with the provisions of this act. Such bond shall be signed by the operator as principal, and by a good and sufficient corporate surety, licensed to do business in the state, as surety.

(b) The penal sum of such bond shall be determined by the Department as not less than Three Hundred Fifty Dollars ($350.00) nor more than Six Hundred Fifty Dollars ($650.00) for each acre, or fraction thereof, of the affected land. For coal and copper mining, the minimum bond shall be Five Thousand Dollars ($5,000.00). For all other mining, the bond shall be the amount per acre as determined by the department times the number of acres, or fraction of acres involved; however, in no event shall the bond be less than One Thousand Dollars ($1,000.00). Provided no bond

will be required for any sand or gravel producer who sells less than One Thousand Dollars ($1,000.00) per year, when a statement of proof for exemption in the form of a certified affidavit shall be provided by the sand or gravel producer each year before July 1 for the previous twelve (12) months from July 1 through June 30.

In determining the amount of the bond within the above limits, the Department shall take into consideration the character and nature of the overburden, the future suitable use of the land involved and the cost of reclamation to be required. In a particular instance where the circumstances are such to warrant an exception, the Department may reduce the amount of the bond for a particular operation to less than the required minimum, or increase the bond for a particular operation to more than the prescribed maximum.

(c) A bond shall not be cancelled by the surety except after not less than ninety (90) days' prior written notice to the Department. Bonds may be continued in effect from year to year, and a new bond need not be provided for each permit year. A single bond may cover all of the operator's mining operations in the state. The penalty of the bond or amount of cash and securities, as provided in subsection (3) of this section, shall be increased or reduced from time to time as provided in this act.

(d) If the license to do business in the state of any surety upon a bond filed with the Department pursuant to this act shall be suspended or revoked, the operator, within thirty (30) days after receiving notice thereof from the Department, shall substitute for such surety a good and sufficient corporate surety licensed to do business in the state. Upon failure of the operator to make substitution of surety as herein provided, the Department shall have the right to suspend the permit of the operator to conduct operations upon the land described in such permit until such substitution has been made.

(e) In lieu of such bond, the operator may deposit cash and government securities with the Department in an amount equal to that of the required bond on conditions as above prescribed. In the discretion of the Department surety bond requirements may also be fulfilled by using existing reclaimed areas, in excess of cumulative permit or mined acres, that have been completed under the jurisdiction of this act and approved by the Department.

(f) Such bond or security shall remain in effect until the mined acres have been reclaimed, approved and released by the Department. If the Department determines that grading has been satisfactorily completed pursuant to this act, the Department may release up to eighty percent (80%) of the penal sum of the bond filed for each acre of land graded.

§ 729. *Violations — Notice — Hearing — Enforcement*

The Department shall notify the operator and the surety in writing of any claimed violation of the provisions of this act or the rules and regulations of the Department. If the operator denies the alleged violation, the Department shall hold a hearing on said charges. Said hearing shall be held not less than thirty (30) days from the notice of hearing.

At such hearing the operator shall have the right to present evidence in opposition to the claimed violation.

If upon such hearing the Department shall determine that a violation has occurred, the Department shall make detailed findings of the violation and the necessary corrective measures. The order shall provide a reasonable time, commensurate with the work to be done, for the operator to perform the corrective measures. The surety may perform for the operator.

If the operator fails to perform the corrective work required by the Department or fails to properly perform said work, the Department may contract for the work to

be done. The Department shall not issue any permits to an operator who has failed to perform such corrective work, or has defaulted with respect to the bond or other security required by Section 728 of this title, until such obligations are met by the operator or his surety or agent, as determined by the Department.

The Attorney General, upon request of the Department, shall institute proceedings to recover any damages and expense which the Department may have sustained by reason of the default of the operator but in no event shall such recovery exceed the face amount of the bond. Such proceedings shall be brought against the operator and surety either in Oklahoma County or the county in which the violation occurred.

§ 730. *Lateral support*

In the case of strip mining operations which remove and do not replace lateral support, unless pursuant to written agreement between the operator and the adjacent property owner, the top of the consolidated material of the open cut adjacent to the property line of other property not owned or leased by the operator shall, at the time mining is completed, not be closer to such other property line than a distance of twenty-five (25) feet plus one and one-half (1½) times the depth of such cut as measured from original ground surface to the top of consolidated material.

§ 731. *Maps — Release*

The operator shall submit to the Department, no later than September 1 following the end of each permit year, a map in a form approved by the Department showing the location of the pit or pits by section, township, range and county, with such other description as will identify the land which the operator has affected by mining during such permit year and has completed mining operations thereon, with a legend upon such map showing the number of acres of affected land. Such map shall also show in acres the ex-

tent of the reclamation accomplished on the affected land, including grading and revegetation efforts, as of the end of the permit year, and shall show by appropriate designation any deviation from the plan of reclamation filed under subsection (c) of Section 724 of this title and the reasons therefor.

Whenever an operator shall have completed all requirements under the provisions of this act as to any affected land, he shall notify the Department thereof. If the Department determines that the operator has completed reclamation requirements and achieved results appropriate to the use for which the area was reclaimed, the Department shall release the operator from further obligations regarding such affected land and the penalty of the bond shall be reduced proportionately.

§ 732. *Powers and duties of Department*

In addition to the duties and powers conferred on the Department in other provisions of this act, the Department shall have authority and power to:

(a) Adopt and promulgate reasonable rules and regulations respecting the administration of this act and in conformity therewith and the Administrative Procedures Act.

(b) Order, after hearing, the revocation of any permit issued hereunder for violation of this act.

(c) Cause to be instituted, in any court of competent jurisdiction, legal proceedings for injunctive or other appropriate relief to enforce this act.

(d) Make investigations and inspections which are necessary or appropriate to insure compliance with this act.

(e) Collect and disseminate information relating to reclamation of affected lands.

(f) Request the assistance of any federal or state agency for technical advice or any other type of assistance deemed necessary to carry out the purposes of this act.

§ 733. *Legal assistance*

At the request of the Department the Attorney General shall provide such legal assistance as may be needed in interpreting, enforcing and carrying out the provisions of this act including but not limited to institution of and prosecuting legal actions and proceedings for injunctive relief and this improvement shall include the provisions of Section 17 hereof.

§ 734. *Chief Mine Inspector*

Any act authorized to be done by the Department may be performed by the Chief Mine Inspector, or an assistant designated by him.

§ 735. *Sand and gravel — Inspections — Penalties*

The Department is designated as the agency to make safety inspections in sand, sand and gravel and in quarrying operations. Any person required by this act to have a permit who engages in mining without a valid permit therefor issued pursuant to this act is guilty of a misdemeanor, and on conviction thereof shall be fined not less than Fifty ($50.00) nor more than One Thousand Dollars ($1,000.00). Each day of operation without the permit required by this act shall be deemed a separate violation.

§ 736. *Revoked permits*

In no event shall a permit be issued to any operator if a permit issued to such operator has been revoked under Section 12 of this act.

§ 737. *Governmental agencies to conform*

Any municipal or county governmental agency or body engaged in mining as defined in this act shall conform to all requirements of this act respecting reclamation of affected lands.

§ 738. *Judicial review*

All final decisions and orders of the Department shall be subject to judicial review of the acts of administrative agencies.

APPENDIX F

STATE OF OKLAHOMA
THE ATTORNEY GENERAL
LARRY DERRYBERRY
State Capitol, Oklahoma City, Oklahoma 73105, Telephone 405/521-3921

[Seal of the State of Oklahoma]

October 16, 1978

Mr. Ward Padgett
Chief Mine Inspector
Department of Mines
117 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: Rock Island Property
Reclamation

Dear Mr. Padgett:

This letter is being provided pursuant to our previous discussions and your request for information concerning the reclamation problem existing on certain property owned by the Rock Island Improvement Company and located in Latimer and LeFlore Counties, State of Oklahoma.

As you recall, the circumstances giving rise to your request are basically as follows.

In the instant matter, the Rock Island Improvement Company, owner, leased certain properties located in LeFlore and Latimer Counties, State of Oklahoma, to Helmerich and Payne, Inc., a Delaware corporation, the same said lease being for lessee's contemplated mining operation in those areas. Additionally, Helmerich and Payne subleased their interest in said property to one Sam Sexton, Jr., said sublease and agreement being for the purpose of allowing sublessee to conduct mining operations in this area.

It is our understanding that the mining permit in question, the same being as provided for under the provisions

of Title 45, O.S. 1971, §724, was previously issued to the operator, Sexton, sublessee. It is further our understanding that the surety bond as required under the provisions of Title 45, O.S. 1971, §728, was provided, in the amount of $50,000.00, by said operator.

We have been advised that the property in question is presently in need of substantial reclamation work, that directions and orders from your office as to such required reclamation has not heretofore been complied with and further that the surety bond and corresponding proceeds thereof has been provided to your office for reclamation purposes pursuant to the failure of reclamation as required by law and directives from your office.

With these circumstances, you have requested an advisal from this office regarding liability for reclamation work presently required, and the cost of which will exceed the amount and proceeds of bond which have been provided to the State of Oklahoma.

Monetary recovery for and in behalf of the State of Oklahoma in the case of failure to perform required reclamation is provided for under the provisions under the Oklahoma "Mining Lands Reclamation Act", the same being as is found at Title 45, O.S. 1971, §721 et seq. Specifically, Section 729 of this Act provides for the referred recovery. Under this section, once a determination has been made that corrective reclamation measures must be undertaken by an operator, authority is given to the mining department, in the event of default on the part of the operator, to contract to have the required work performed. This statutory provision goes on to state:

> "The Attorney General, upon request of the Department, shall institute proceedings to recover any damages and expenses which the Department may have sustained by reason of the default of the operator but in no event shall such recovery exceed the face amount of the bond. Such proceedings shall be

brought against the operator and surety either in Oklahoma County or the county in which the violation occurred."

As can be determined from a plain reading of the above-quoted section, the Department, by and through this office, may institute an action to recover damages and expenses incurred in the required reclamation, such recovery to be from the operator and/or surety. However, such recovery is limited to the face amount of the bond previously required and provided. Accordingly, it appears that if, in the instant matter, the bond proceeds subject herein have been provided to the State of Oklahoma, then the State of Oklahoma has already recovered, from a monetary standpoint, all that is allowed to be recovered in such proceedings under the violations statute. Stated otherwise, reclamation liability as to the State of Oklahoma appears to be limited for recovery purposes, to the amount of the bond provided pursuant to Section 728, supra. If the State of Oklahoma has already been provided with this amount, then the State of Oklahoma has recovered all that could be recovered under the statute in a civil proceeding.

With respect to other actions which may be taken, it should be recalled that 45 O.S. 1971, §724, pertaining to mining permits, does provide for a criminal sanction for any operator who engages in mining operations not authorized by lawful permit. This section of the statute in essence provides that if an operator engages in separate mining operations not authorized by any existing mining permit, then in that event such operator may be criminally liable for such acts which exceed mining operations authorized by law. Accordingly, this section of the statute may be considered with respect to any further action that may be taken should it be determined that the operator in question exceeded the mining operations authorized by any permit held by such operator.

[APPENDIX]

It should be noted that this opinion, in respects relevant to reclamation liability, has no effect upon that liability which may exist between the parties herein, i.e., the Rock Island Improvement Company (lessor), Helmerich and Payne, Inc (lessee), and Sam Sexton, Jr. (sublessee). From our review of the various lease and sublease agreements submitted with your inquiry, it would certainly appear that the lessee and sublessee herein would be jointly and severally liable to the land owner, lessor, for improvements which may be required to restore the subject land to a condition as nearly as possible as its condition prior to the conduct of mining operations. This would appear to be reflected at paragraphs numbered 3 and 14 of the lease agreement between the lessor and lessee as well as at paragraphs 2, 7 and 12 of the sublease agreement. In this connection it should be additionally noted that this office is without authority or jurisdiction to seek to resolve issues of liability as they pertain to and between the private parties involved in this matter. However, in response to that aspect of your inquiry pertaining to this aspect of the reclamation work, it would be our impression from the review we have had an opportunity to conduct, that the lessor in this matter may indeed recover from the lessee and/or sublessee for restoration work which may be required above and beyond that which may be secured with the heretofore submitted operator's bond proceeds.

Should you require any additional information regarding this matter, please do not hesitate to contact this office at your convenience.

Sincerely yours,

(s) *R. Thomas Lay*
R. THOMAS LAY
ASSISTANT ATTORNEY GENERAL

APPENDIX G

APPRAISAL ASSOCIATES
COMPLETE APPRAISAL SERVICE

office of
OTIS H. EVERSOLE, A.S.R.A., I.F.A.C., C.R.A.

116 South Fourth Street
Muskogee, Oklahoma 74401
Area Code 918 - 682-6640

Re: Tract No. 1 being the interest of Rock Island Improvement Company in the NE 1/4 of Section 25, Township 5 North, Range 25 East, LeFlore County, Oklahoma.

In our opinion, on July 31, 1977, Tract 1, with full and complete reclamation, would have had a fair market value of	$285,567.00
In our opinion, on July 31, 1977, Tract 1 (As Is Condition) had a fair market value of	281,716.00
Increased value of Tract 1 caused by complete reclamation	$ 3,851.00
In our opinion, on July 31, 1977, Tract 1 less coal, with full and complete reclamation, would have a fair market value of	50,567.00
In our opinion, on July 31, 1977, Tract 1 (As Is Condition), less coal, had a fair market value of	46,716.00
Increased value of Tract 1, less coal, caused by complete reclamation	$ 3,851.00

Respectfully submitted, this 3rd day of November, 1980.

APPRAISAL ASSOCIATES
by (s) *Otis H. Eversole*

[APPENDIX]

APPRAISAL ASSOCIATES
COMPLETE APPRAISAL SERVICE

office of
OTIS H. EVERSOLE, A.S.R.A., I.F.A.C., C.R.A.

116 South Fourth Street
Muskogee, Oklahoma 74401
Area Code 918 - 682-6640

Re: Tract 2, being the interest of Rock Island Improvement Company in N½ NE¼ and E½ NW¼ of Section 31, Township 5 North, Range 26 East, LeFlore County, Oklahoma.

In our opinion, on July 31, 1977, Tract 2, with full and complete reclamation, would have had a fair market value of	$215,274.00
In our opinion, on July 31, 1977, Tract 2 (As Was Condition) had a fair market value of	212,328.00
Increased value of Tract 2 caused by complete reclamation	$ 2,946.00
In our opinion, on July 31, 1977, Tract 2 less coal, with full and complete reclamation, would have a fair market value of	25,778.00
In our opinion, on July 31, 1977, Tract 2, (As Was Condition), less coal, had a fair market value of	22,832.00
Increased value of Tract 2, less coal caused by complete reclamation	$ 2,946.00

Respectfully submitted, this 3rd day of November, 1980.

APPRAISAL ASSOCIATES
by (s) *Otis H. Eversole*